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Agency Counsel Newsletter

SCOTT HARSHBARGER, ATTORNEY GENERAL
Office of the Attorney General One Ashburton Place Boston, MA 02108-1698 (617)-727-2200

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SEP 14 1993
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Issue No. 1 October, 1992

A NOTE FROM THE ATTORNEY GENERAL

To All Agency Counsel:

I hope you will find this first issue of the Agency Counsel Newsletter useful. It will bring you up to date on some important court decisions; share with you some lessons we have learned from recent litigation; and offer information on various matters of continuing interest to your office and ours. You will also find descriptions of some of the resources we have to offer, including written materials, training sessions, and members of my staff who are available to consult on particular issues that may arise at your agency. In short, the newsletter is aimed at assisting you in performing the wide variety of tasks, involving both internal agency operations and the agency's substantive mission, that agency counsel must confront on a daily basis.

But that is not all; the newsletter is also a means of seeking your assistance in helping us all do our job better. To that end, you will find suggestions on how to avoid litigation and, when litigation is inevitable, how to prepare for it so that we can represent your agency more effectively and with a greater chance of success. Additionally, especially in the affirmative litigation area, I have made it a priority to pursue cases aimed at:

-- making quality health care more affordable and more widely available;

-- protecting the elderly from abuse and exploitation in the marketplace and the home;

-- exposing fraud, as it affects consumers, businesses, and taxpayers, and vigorously prosecuting the perpetrators; and

-- combatting urban violence.

As Attorney General, I am particularly interested in receiving case referrals from your agency in these areas. You will also

find in this newsletter a description of some of the task forces and advisory groups that I have established in order to address various aspects of these and other problems. If your agency is not already doing so, I encourage you to participate in one of these groups.

In sum, I hope the newsletter serves as a valuable source of information to you and as a tool to increase cooperation between our offices. I welcome your comments, as well as your suggestions for topics to be addressed and submissions of items to be included in future issues. A response sheet has been included for this purpose.

Please let me know what you think.

Sincerely,

Scott Harshbarger

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SOME RECENT CASES

City of New Bedford v. Energy Facilities Siting Council, 413 Mass. 482 (1992).

This was an unusual case in which the Attorney General joined a municipality in seeking judicial review of a state agency decision. The case involved the siting of a coal-fired electric cogeneration facility in New Bedford. The Energy Facilities Siting Council (EFSC) approved construction of the facility over the objections of the City of New Bedford, the Attorney General, and others. After judicial review, the SJC remanded the case to EFSC for reconsideration, for a number of reasons that may be of interest to agency counsel.

First, the SJC concluded that EFSC had failed to apply the standard of the governing statute, G.L. c. 164, § 69H, which requires that no new energy facility be approved unless the power is necessary for the Commonwealth, the facility would have a minimum environmental impact, and the energy would be supplied at the lowest possible cost to the ratepayers. Instead of balancing the minimum impact and lowest cost elements, EFSC relied too heavily on resource use and development policies and on the perceived economic development benefits of the plant. EFSC found that the proposed coal plant was as clean as a coal plant could be, but declined to engage in the required comparative review of alternative fuels and technologies that might have lesser environmental impact.

The lesson may be that an agency that disregards the express mandate of its governing statute, even in order to pursue other desirable policies such as economic development, risks having its decision overturned. See also Massachusetts Municipal Wholesale Electric Co. v. Energy Facilities Siting Council, 411 Mass. 183, 189 (1991) (EFSC exceeded statutory authority by requiring individual energy forecasts from members of MMWEC where statute gave option to provide a single joint forecast).

Also, because the statute required a finding on whether a new energy project was necessary "for the Commonwealth," EFSC's finding of need on a New England-wide basis was inadequate. In addition, the SJC noted that EFSC had failed to make the required finding on whether the proposed new power would be produced at the lowest possible cost to ratepayers. The lesson here is that an agency should be careful to make at least those findings expressly required by statute, even if the agency also wishes to make findings on other issues.

Finally, the SJC agreed that EFSC had failed to explain with sufficient specificity the reasoning -- in particular, the balancing of statutory factors -- underlying its decision. "The final decision must do more than merely identify conflicting interests and contentions," said the SJC; it must go on actually to state the basis of its determination and to resolve each issue of law and fact necessary to the decision, so as to permit adequate judicial review. (AAG Fred Augenstern)

Commonwealth v. Elm Medical Laboratories, Inc., 33 Mass. App. Ct. 71 (1992).

This case establishes unequivocally that the Commonwealth and its agencies are not "persons" who may be liable under the state Civil Rights Act, G.L. c. 12, §§ 11H, 11I. The Appeals Court based its decision both on an interpretation of the word "person" and on the lack of the requisite clear and explicit expression of the Legislature's intention to waive sovereign immunity.

The case arose when the Attorney General, at the request of the Department of Public Health (DPH), brought a civil action under G.L. c. 93A against a medical laboratory that was improperly performing Pap smear tests. The laboratory brought cross-claims under the state Civil Rights Act against DPH and various DPH officials, claiming that its civil rights had been violated, inter alia, by DPH's release of a warning letter about the laboratory. We argued that the Civil Rights Act did not apply to state agencies and officials acting in their official capacities; the trial court agreed, the laboratory appealed, and the Appeals Court affirmed.

This decision, along with the decision in Will v. Michigan Department of State Police, 491 U.S. 58 (1970) that a state and its officials acting in their official capacities are not "persons" for purpose of liability under 42 U.S.C. § 1983, means that state and federal civil rights actions against agencies and officials in their official capacities are dismissable at the outset. Of course, officials are still liable to injunctive relief under section 1983, and agency personnel sued in their individual (as opposed to or in addition to their official) capacities may be liable for damages under both federal and state law unless protected by absolute or qualified immunity. See Elm Medical Lab, 33 Mass. App. Ct. at 81-82 n.15 (discussing immunity under state Civil Right Act). Nevertheless, the Appeals Court's decision does

provide an extra layer of protection for the state treasury and for agencies and officials seeking to carry out their statutory missions. (AAGs Susan Papanek McHugh and Will Matlack)

Bertone v. Department of Public Utilities, 411 Mass. 536 (1992).

This case involved the recurring issue whether a particular agency charge is a fee, which an agency may require when authorized by statute, or a tax, which an agency would ordinarily lack the authority to assess. Quoting from Emerson College v. Boston, 391 Mass. 415, 424-25 (1984), the SJC in Bertone identified three "common traits" that distinguish fees from taxes:

> [1] they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society.' . . .; [2] they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge . . ., and [3] the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses.

Thus, to be classified as a fee, a charge first must relate to a governmental service identifiably provided to those subject to the charge. Secondly, the party charged must be able to avoid payment by foregoing the service, although -- as in Bertone -- this may result in other consequences. See 411 Mass. at 549 (plaintiff developers not "compelled" to pay fee even if they cannot develop land without doing so). Third, the revenues derived from the charge must be "reasonably calculated to meet expenses incurred in providing [the service]." Id. at 549-50.

Because agency-imposed fees are frequently challenged on the ground that they are actually taxes, agencies in the process of implementing fee-authorizing legislation should keep these three factors in mind. Agency implementation can be critical, because the Legislature's characterization of a charge as a "fee" will not prevent a court from examining whether a charge actually operates as a tax. Emerson College, 391 Mass. at 424. In particular, any fee should be structured so that, as nearly as possible, it is paid directly by those who actually receive a corresponding service, rather than by a wider class of persons or by intermediaries.

Also, the fee structure should bear a reasonable relationship to the cost of providing the service. The courts have not defined with precision the requisite degree of "fit"; some incidental revenue is permissible, Robinson v. Secretary of Administration, 12 Mass. App. Ct. 441, 448 (1981), and a substantial range of costs (including "general administrative overhead") may reasonably be taken into account when setting the fee level. Id. at 447 n.10. But this is an evolving area, and in this period of scarce resources the courts may scrutinize fee levels with extra care to ensure that they do not raise significant amounts of revenue not directly related to defraying the cost of providing the service in question. It would greatly assist us in defending a challenged fee if an agency has preserved a detailed explanation of how the amount of a fee was calculated in relation to the cost of providing the service. (AAG Eric Smith)

Oznemoc, Inc. v. Alcoholic Beverages Control Comm'n, 412 Mass. 100 (1992).

This case analyzes an agency's responsibilities in adjudicating licensure matters at the same time that a related criminal case is pending. In this case, the licensee, a bar doing business as "The Naked I," argued that the ABCC should not adjudicate a license suspension until criminal charges involving the same facts were disposed of. The licensee argued that the Fifth Amendment rights of one of its employees would be compromised, because the licensee wanted to use the employee's testimony before the agency but the employee did not want to testify until after the criminal proceedings against him were completed. The licensee also argued that its own right to due process was implicated when the ABCC decided to go forward with the suspension hearing knowing that the witness would not testify.

The SJC held that the licensee had no right to postponement of the administrative proceeding until after the criminal trial was completed. Rather, it held, the agency must balance the rights of the licensee against the rights and interests which the agency is designed to protect. Here, because the charges against the licensee involved public safety (including charges that its employees had assaulted patrons) the SJC concluded that the agency appropriately adjudicated the suspension before the criminal proceeding was completed. (AAG Jon Laramore)

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LESSONS WE'VE LEARNED

Thoughts on Major Changes in Agency Programs and Policies

In defending challenges to changes in agency programs and policies over the last few years, we have learned three major lessons worth passing on to agency counsel:

First, the sooner we get involved, the better. Often, perhaps even most of the time, agencies considering major program changes are in a position to predict which changes will be challenged in court, and on what grounds. Such predictions are possible because of input you receive from advocates, federal agencies, and other sources while the program change is under consideration, in the Legislature, in agency rule-making, or otherwise.

In these situations, you necessarily formulate your own views on the merits of the legal issues raised; in some instances, those views may even be embodied in memoranda or other documents generated within the agency. If you give us the benefit of those views, and of all supporting materials, as soon as you have them, we can get a head start on preparing to respond to the complaints that inevitably will come to us, often with injunctive proceedings scheduled on short notice, and we can avoid duplicating the work you have already done. If you get us involved while the policy is still under development, we may be able to provide suggestions to help you accomplish your policy objectives while making the change as challenge-proof as possible.

Second, if the policy itself is controversial, that is the time to make sure you follow all procedural requirements to the letter. The courts generally acknowledge the limits of their authority with respect to substantive policy, and when lower courts overstep on policy matters, we can usually get relief at the appellate level. Advocates, too, understand that they need more than sympathetic policy arguments to persuade courts to interfere with agency decision-making. Procedural missteps, however, provide the perfect fodder for judicial intervention.

Accordingly, advocates who are hostile to the substantive policy being implemented can be assumed to be monitoring procedures closely. Examples of procedural lapses that can scuttle an agency's policy initiatives are: program changes

implemented without the promulgation of regulations; the use of emergency regulations without any identifiable emergency; the failure to meet time requirements imposed by statute or regulation; and the failure to provide hearings required by rule or statute.

Finally, it is crucial that disagreements between agencies of the executive branch be resolved outside of litigation. Nothing invites judicial intervention more than the slightest hint of finger-pointing, or buck-passing, between executive agencies. This is particularly so in cases involving human services; a court perceiving that the various agencies are unable to coordinate their handling of a particular problem or client is likely to conclude that it needs to step in and take over, thus depriving the executive branch of the power to manage itself. Moreover, infighting among agencies tends to undermine arguments based on deference to administrative expertise and discretion.

Therefore, disputes over policy or administrative role must be resolved within the executive branch, before any of the agencies expresses a position in the litigation. Disagreements on the law should be raised with the Attorney General's office, which may be able to facilitate a resolution among the agencies, and in any event will define a consistent position to be expressed in court. (Contact: Government Bureau Chief Judy Fabricant)

Anticipating Employment Litigation

Two recent employment cases in Superior Court -- one involving an employment discrimination trial and the other a disciplinary matter that was settled -- provide several lessons worth passing on to agency counsel.

First, it is critical that serious performance problems on the part of any employee be documented quickly and completely. Even if the employee's regular evaluation is not scheduled for some time, problems should be documented as soon as a supervisor becomes aware of them. This will avoid the necessity of advancing the difficult, if not untenable, position that "everyone knew" that the employee was having performance problems, although no one noted it in writing. Also, keep in mind that memories fade and witnesses do disappear and die as time goes on. The death of a key state witness in one of the cases mentioned above made our task much more difficult. While death may be unavoidable, poor record keeping and documentation is not.

Second, agency managers should pay careful attention to the working conditions and duties of individuals who may be the sole woman or member of a minority group (or one of a small number) in a given office or with a particular job description. If, for example, there is a legitimate, non-discriminatory reason why an individual has received arguably inferior office space or onerous assignments, those reasons should be noted in writing, particularly if the individual expresses complaints or dissatisfaction.

Third, if an employee is to be terminated, demoted, or reassigned because of poor performance, it is not helpful to try to couch the reasons for the action in vague terms. For example, do not tell the employee who is being terminated for poor performance that he or she is being terminated due to "pending major programmatic changes." Although you may have the laudable goal of trying to prevent hurt feelings, at trial plaintiff will argue that in fact there were no "major changes" made in the program and that it is odd that your agency now says that the termination was for poor performance but did not say so at the time.

Fourth, in documenting employee problems, in investigative reports, memos to agency decisionmakers or to the file, etc., agency personnel should always assume that a court, a jury, and the employee involved will someday be reading and scrutinizing the document. Avoid including information that the agency views as too "sensitive" to come out, because it may be very difficult to hold the document back in litigation. If the contemplated action cannot be supported based on information that the agency is willing to have become public, the agency needs to choose between being ready to release other information and foregoing the contemplated action.

Finally, it is worth emphasizing the seemingly obvious point that whenever disciplinary action is to be taken, or whenever an employee is to be reassigned, transferred, suspended, or laid off for some other reason, be sure you know whether the employee is entitled to any kind of hearing or other procedures, including notification of rights. Consider the agency's substantive laws; the civil service laws, G.L. c. 31; the retirement laws, G.L. c. 32; and any applicable collective bargaining agreement. If a hearing is required, hold it even if it seems likely to be pro forma or a waste of time, even if no facts are in dispute. To do otherwise can result in substantial costs to the Commonwealth down the line. (Contacts: AAGs David Hofstetter, Beth Levi)

Contact with Opposing Counsel
Once Litigation has Commenced

When your agency becomes involved in litigation, it is well worth reminding all relevant agency personnel of an often-overlooked point: there should be no direct communication between agency personnel and opposing counsel. When the Attorney General is representing your agency, as will usually be the case, this principle extends further; it means that agency counsel, too, ordinarily should not communicate directly with opposing counsel, unless and until our office has discussed with you the question whether direct contact is appropriate in the particular case.

There will, of course, be many instances in which we and you will agree that direct communication between agency counsel and opposing counsel will save everyone's time and not risk any prejudice to the case. There are, however, occasions on which your agency's interests will be better served, and a significant amount of agency personnel time will be saved, if all contacts are routed through our office. Opposing counsel will sometimes feel free to call you directly, viewing you as counsel rather than client. From our standpoint, in contrast, you are usually our principal client contact and in our view are therefore entitled to be protected from direct interactions with opposing counsel.

The more important point, however, involves non-lawyer agency personnel, who may be in possession of substantial information that would benefit opposing counsel. Such personnel may be accustomed to furnishing this information to members of the public, or even to the lawyer involved, outside of the context of litigation. It would help us if these personnel are reminded at the outset of a case that all case-related inquiries from opposing counsel should be referred to us, or you if we have agreed along these lines. If you have questions about these issues in a particular case, please feel free to raise them with the AAG representing your agency as early as possible in the case. (Contacts: Government Bureau Chief Judy Fabricant, or Division Chiefs Judy Yogman and Stuart Rossman)

A related issue -- how to respond to litigation-related public records requests -- will be addressed in a future issue of this newsletter.

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THE ATTORNEY GENERAL'S PRIORITIES

[This section of the newsletter focuses on the work of the Attorney General's office in the priority areas of health care, fraud, the elderly, and urban violence. Featured in this issue are some aspects of the health care and fraud areas; others will be featured in future issues.]

Health Care: New Opportunities, New Dangers

Chapter 495 of the Acts of 1991, entitled "An Act Improving Health Care and Financing," essentially has deregulated the contracting process between health care providers and insurers. The legislation aims to hold down the costs of health care and health care insurance by introducing competition into the marketplace, in the place of government regulation. But the legislation also increases the possibilities for anticompetitive conduct in the health care field, a matter of concern to the Attorney General's Antitrust Division. We are therefore soliciting comments, ideas, and especially potential case referrals from agency counsel in this important area.

Theoretically, insurers competing with each other for subscribers will seek to offer the best package of services at the lowest rates. To do this, they will only contract with those hospitals and health care providers that agree to accept relatively low rates of reimbursement.

Because competition is the cornerstone of this plan to contain health care costs, it is a matter of concern that hospitals, health care providers, or insurers might undertake anticompetitive conduct in order to avoid the rigors of competition, and the accompanying downward pressure on their prices. In the new "free market" climate, there are a number of ways in which health care related companies may try to avoid competition at the public's expense.

For instance, hospitals, health care providers, or insurers may engage in collusion, in violation of the antitrust laws. Examples of such illegal collusion include: 1) hospitals or other health care providers agreeing among themselves to hold the line at particular prices for particular services, in their contract negotiations with insurers; 2) insurers agreeing among themselves to use their collective clout to force hospitals to accept certain rates of reimbursement for certain services; and

3) hospitals agreeing among themselves that each will be the only hospital in a given area to offer a certain service to the public, thereby dividing up the health care "territory."

Another type of anticompetitive conduct of particular concern is bid-rigging, in which various competitors split up available public contracts among themselves, agreeing to fix the outcome of the bidding process on each such contract. Bid-rigging assures each conspirator its "share" of the pie, and results in the public paying more for goods and services than it would if bidding were truly competitive.

Monopolization is also a possible threat. In a particular geographic area, or market, one insurer, hospital, or health care company might have such great market power that it can virtually dictate the terms of its contracts with other entities.

A related problem exists when a hospital with a very large market share, i.e., a large share of hospital patients, follows a policy of making referrals for outpatient care only to companies that are affiliated with it in some way. For instance, the largest hospital in a certain area might refer all of its discharged patients needing home nursing care to a particular home nursing company, with which it has a financial connection. Such exclusive referral policies can squeeze out competition among providers of outpatient care services, and lead to higher prices and less consumer choice.

It remains to be seen what effects Chapter 495 will have over time on the availability, cost, and quality of health care services and insurance in Massachusetts. Agency counsel coming into contact with any aspect of health care contracting should be aware of the various types of anticompetitive practices we may encounter, and bring any questionable conduct to the attention of AAG Leslie Davies of our Antitrust Division.

The Public Integrity Division

Investigation and prosecution of corruption and fraud by those in the public sector is handled by the Public Integrity Division of the Attorney General's Criminal Bureau. Over the past 18 months the Division has prosecuted more than 30 individuals on charges ranging from solicitation and acceptance of bribes and gratuities by those in positions of public trust, to falsifying claims for payment to the Commonwealth, to larcenies in amounts exceeding $1 million from municipal and state agencies.

Some recent examples of cases prosecuted by the Public Integrity Division include:

-- the conviction of a former employee of the Executive Office of Communities and Development for larceny of over $350,000 of agency funds designated for job training; the defendant was sentenced to nine to twelve years in state prison and an order of restitution;

-- the conviction of a former assistant clerk magistrate of Plymouth and Charlestown District Courts for stealing bail money and altering official court records. The defendant was sentenced to serve six months in the House of Correction;

-- the conviction of a former municipal official of the City of Chelsea for soliciting and accepting corrupt gifts. The defendant was sentenced to serve 60 days in the House of Correction and ordered to pay restitution;

-- the conviction of a former accountant for the Department of Public Welfare for larceny of over $400,000 of agency funds through falsification of vouchers. The defendant was sentenced to seven to ten years in state prison;

-- the indictment of the former business manager of the Ashburnham-Westminster Regional School District for larceny of approximately $1.1 million from the school system; and

-- the indictment of a state representative for conflict of interest charges in connection alleged illegal campaign contributions.

Many of these cases were developed and investigated in cooperation with other agencies concerned with integrity in government, including the Office of State Auditor, the State Ethics Commission, the Office of Campaign and Political Finance and the Inspector General.

The many prosecutions of public employees who have stolen funds from an agency, or from programs the agency administers, underscore the importance of regular audits in situations where checks are issued or disbursements made. The detection of irregularities in the accounting procedures assists in exposing fraudulent conduct and can serve to deter further abuse.

The Public Integrity Division regularly screens referrals from state and municipal agencies and reviews allegations of

criminal conduct for possible prosecution. Specifically, if counsel are aware of instances of corruption or fraud within the agency, they should contact the Public Integrity Division with the information.

In addition to the efforts described, the Attorney General has convened an Advisory Group of representatives of agencies which meets regularly to share concerns about public integrity in government. By virtue of the resulting exchange of information, agencies can be more responsive to allegations of misconduct, undertake preventive measures to insure oversight, and promptly report problems. Discussions have focused on coordination of investigative efforts and resources and have increased understanding of how different agencies function. (Contact: Public Integrity Division Chief Patricia Bernstein)

Workers Compensation Fraud Task Force

In September, 1991, Attorney General Harshbarger created the Attorney General's Task Force to Reduce Waste, Fraud and Abuse in the Workers' Compensation System and invited a cross-section of interested parties to join. Among the Task Force members are representatives from state agencies such as the Department of Industrial Accidents, PERA and the Executive Office of Health and Human Services plus prosecutors, members of the private bar who represent employees before the DIA, private employers, insurers, employee unions, risk management firms, private investigators, health care providers, the Insurance Fraud Bureau and members of the Legislature.

The initial intent of the Task Force was to focus and comment on the workers' compensation reform legislation being debated last fall to ensure that the fraud provisions in the bill gave prosecutors sufficient tools to pursue criminal action against any party who may commit fraudulent acts in the workers' compensation system including employees, employers, health care providers, attorneys, insurers and agents.

After c. 398 was enacted in late December, the mission of the Task Force shifted to establishing protocols and a mechanism for referral of cases of suspected fraud to the Attorney General. To successfully prosecute these cases it is important that all parties operate within the framework of these referral protocols. Agency counsel need to (a) understand that the standard for referral is higher and more burdensome that many of the anecdotal stories of alleged fraud we all hear about, and (b) encourage agency staff responsible for the DIA process to work closely with PERA, the agency which

acts as the state's insurer, to fully document, investigate and analyze all relevant evidence or facts before referral, through PERA, to the Attorney General for possible prosecution. (Contact: AAG James Bryant, 727-2866)

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MATTERS OF CURRENT INTEREST

Electioneering on Agency Premises and By Agency Employees

Questions have arisen for some agency counsel regarding what campaign activities the agency should or must allow on agency property. Some activity is clearly prohibited, such as the solicitation of money for political purposes in state buildings. G. L. c. 55, § 14. "No person shall in any building or part thereof occupied for state, county, or municipal purposes, demand, solicit and receive any payment or gift of money or other thing of value" for any political purpose.

Other campaign activity, such as distributing literature, on agency property can be regulated through reasonable time, place and manner restrictions. Most agency premises would likely be considered "non-public fora" for the purposes of regulating First Amendment activity. International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711 (1992); United States v. Kokinda, 497 U.S. 720 (1990). Accordingly, the agency could issue regulations for the purpose of preventing candidates and campaign volunteers from obstructing traffic, harassing pedestrians or preventing employees from doing their job. See ISKC; Kokinda; Batchelder v. Allied Stores International, 388 Mass. 83 (1983). See also the entries under "Resources." (Contact: Elections Division Chief William Lee)

For additional information on laws governing political activity by state employees, contact the Office of Campaign and Political Finance. OCPF is empowered to administer and enforce the state campaign finance law. G.L. c. 55. OCPF's publication, A Guide To Political Activity for State, County, and Municipal Employees, serves as an introduction to this area. OCPF also issues interpretive bulletins on specific questions relating to political activity by state employees. Contact OCPF at Room 411, One Ashburton Place, 727-8352.

Some political activity may also raise ethical questions under c. 268A. The State Ethics Commission has an Advisory (Commission Advisory No. 4) that outlines some of the issues and gives advice regarding appropriate conduct by state employees in this area. Contact the Commission at One Ashburton Place, Room 619, 727-0060.

Workers Compensation Devolution Takes Effect

In August of 1991, the Attorney General's office announced that it would cease defending state workers compensation claims at the administrative level. The purpose of the decision was to redeploy our very limited resources to represent the executive and legislative branches in court, as well as to allow agencies to deal directly with their own employees' claims. Effective in August 1992, this transfer is complete. All administrative claims are being handled by the agencies themselves or by a new Litigation Unit created in the Executive Office for Administration and Finance. The Attorney General will continue to defend all workers comp claims in court.

Transfer of this responsibility has made it possible for the personnel who had litigated comp matters to take on other defensive roles. For example, Ellen Caulo, the former Chief of our Industrial Accidents Division (IAD), is handling a variety of tort and administrative law cases. She is presently handling several cases brought by workers comp lawyers who allege that the compensation reform legislation enacted last spring is unconstitutional, as well as taking on negligence cases. Bill Berman, formerly with the IAD, is litigating real estate and tort cases on behalf of agency clients. The two other positions in the unit are being assigned to trial and administrative litigation, respectively.

Finally, the investigators who formerly handled workers comp conciliations will now be available to support defensive litigation. This will make it possible to implement Scott Harshbarger's goal of doing effective investigations at the outset of each case, laying the basis for settlement when appropriate and a vigorous defense whenever necessary. In short, we are confident that the new system for handling workers comp cases will pay significant dividends to all affected agencies. We look forward to your comments. (Contact: Trial Division Managing Attorney Bill Daggett)

The Attorney General and Legal Services: Complex Roles, Creative Solutions

[This article was written by Jeffrey Purcell, a housing attorney for Greater Boston Legal Services, and addresses some of the issues discussed at a June 1992 program involving legal advocacy groups and the office of the Attorney General. It also appears in the September 1992 issue of the Reporter, a publication of the Massachusetts Legal Assistance Corporation (MLAC). We thank Jeff Purcell and MLAC for permission to reproduce the article here; the views expressed are not necessarily those of the Attorney General.]

Legal services advocates and the Attorney General often work together effectively through co-counseling cases, filing amicus briefs, etc. when each seeks to address the same problems. However, legal services and the Attorney General are often adversaries when legal services sues a state agency that the Attorney General defends. These two different roles point to the complex relationship between legal services and the Attorney General which was the topic of a forum of legal services advocates and the Attorney General on June 29, 1992.

Cooperative Strategies

In the first part of the forum, advocates raised many issues which arise when legal services and the Attorney General work together either in filing affirmative cases or defending against cases. What is the role of the Attorney General vis a vis legal services when both are on the same side of an issue? Who initiates legal action? When is co-counseling appropriate? When is it desirable for the Attorney General to write an amicus brief instead of entering litigation as a party? Who control litigation strategy? When is it appropriate to intervene in a case? How are differences regarding settlement resolved? None of these issues has an easy answer but the forum presented an opportunity for attorneys and advocates to brainstorm about solutions.

One area where legal services advocates and the Attorney General work together involves housing. Two recent examples of cooperation are targeting banks which unlawfully evict tenants as trespassers after foreclosure and protecting endangered rooming houses.

Stuart Rossman, now head of the trial division of the Attorney General's office, challenged a bank's practice of

treating tenants as trespassers after foreclosure and evicting them by injunction. Rossman filed suit in the Supreme Judicial Court and obtained a unanimous decision determining that tenants and homeowners are not trespassers after foreclosure and that summary process, not injunctive relief, is the proper way of proceeding with evictions.

Greater Boston Legal Services filed an amicus brief in that action which was cited in the court's opinion. In addition, Greater Boston Legal Services filed a related case in the Housing Court, and obtained an order from Judge Daher prohibiting trespass evictions after foreclosure which was reported to the Supreme Judicial Court.

Close Contact

Legal services and the Attorney General kept in close contact and cooperated throughout the litigation. The attorneys discussed strategy and reviewed briefs, making the combined product better than either office could have achieved alone.

The relationship was similarly useful in a rooming house case. Shortly after the current Attorney General, Scott Harshbarger, was elected, I approached the director of the Public Protection Bureau, Barbara Anthony, and the Government Bureau to request that the Attorney General intervene in a case where the owner of the biggest rooming house in Boston was challenging a Housing Court ruling that it could not operate as a hotel. After discussion, Anthony and the Government Bureau determined that an amicus brief on the issue of the constitutionality of the rooming house law was appropriate rather than filing an appearance as co-plaintiff. This decision avoided the issue of who controlled the litigation and enabled the Attorney General to focus his resources on a limited but crucial area of the litigation.

Successful Results

The result of the case was impressive. The amicus brief and oral argument of Beth Levi of the Government Bureau were instrumental in obtaining a successful result. Judge Daher upheld the Boston Rent Equity Board's ordinance protecting rooming houses and made a point of asking the Attorney General's opinion on the issue. The landlord's motion for a stay of Judge Daher's order pending appeal was recently denied by the Appeals Court.

The relationship between legal services and the Attorney General has been effective for two reasons. First, the role of the Attorney General in bringing affirmative litigation or in defending cases with legal services is important because of the substantive legal analysis provided and the strategizing among attorneys. Second, the Attorney General's involvement in a case adds a great deal of weight to a legal services position because of the stature of his office and his duty to uphold the public interest.

Advocates noted that the Attorney General has investigative powers and standing rights which are greater than those of private parties. While this can bring added options, it also presents some interesting legal issues. For example, the Attorney General is limited in sharing the response to civil investigatory demand letters.

Balancing Dual Roles

The second part of the forum addressed the roles of legal services and the Attorney General when a state agency is accused of unlawful practices. Steven Schwartz, Executive director for the Center for Pubic Representation, raised the dual role of the Attorney General. On the one hand, the Attorney General acts as Solicitor General seeking to protect the public interest and uphold the laws of the Commonwealth. On the other hand, the Attorney General is like the Department of Justice defending government agencies when they are sued. How can this dual role be balanced?

Everyone agreed that advocates should approach the Attorney General early on when lawless activity by a state agency is apparent. Advocates and the Attorney General have the ability to fashion a more comprehensive remedy prior to a judicial determination; this approach allows for more creativity. Harshbarger confirmed his commitment to work with advocates by discussing legal problems with agencies and recommending alternatives to them. He believes that while agencies have the right to set social policy in their domain, his office has the final authority to set a consistent legal policy for the state.

When the agency is acting in a clearly illegal way, the Attorney General will intervene forcefully to change the agency's behavior.

Unfortunately, confidentiality prevents disclosure of these efforts to advocates, especially after litigation commences. Everyone concurred that some litigation would be avoided and problems dealt with expeditiously if advocates approach the

Attorney General quickly. This approach views the Attorney General as a problem solver rather than solely a defender of state agencies.

Critical Issues

What happens when an agency does not rectify its actions despite an early alert by legal services? Advocates suggested that the Attorney General adopt a role closer to that of Solicitor General than the Department of Justice. The Attorney General should not automatically defend state agencies engaged in unlawful conduct. Advocates suggested that the Attorney General establish criteria for defending cases. For example, if there is an absolute violation of law, no defense should be raised by the Attorney General. If the agency is unwilling to reform, the Attorney General should consider farming out the representation of the agency rather than defending it directly.

Farming Out Difficult Cases

However, the Attorney General's representatives at the forum expressed their view that farming out difficult cases may minimize the opportunity for the Attorney General to play a constructive role in settlement discussions or the opportunity to persuade agencies to alter their view of the litigated issues. When the Attorney General perceives the agency has a valid legal basis for the challenged action, the office's statutory role is to mount a defense of the agency at least in the first instance.

The forum ended on a positive note with Scott Harshbarger asking that legal services advocates provide his office with information regarding unlawful activity by state agencies as soon s it becomes apparent. Harshbarger also stated that his office is seeking more affirmative litigation, the Attorney General has been helpful in defending against "slap suits" designed to undermine peoples' ability to enforce their rights.

The Attorney General and legal services have a complex but often symbiotic relationship of which this forum was a valuable part.

The Attorney General and the Solicitor General

[These comments by AAG Jon Laramore also arise out of the June 1992 program involving advocacy groups. The comments address the viewpoint expressed at the program that the role of the Attorney General ought to be more like that of

the United States Solicitor General. They are intended to further discussion of these issues rather than to express the settled policy of the Attorney General.]

The Solicitor General (SG) exercises choice in what cases are appealed (not what cases are defended in the first instance in the trial courts). We do the same. I am aware of no instance, however, in which the SG has declined to defend a statute, even when it does not represent a favored policy of the SG's administration. Likewise, we defend statutes even when they do not represent the policy preferences of the Attorney General. Because the SG is a presidential appointee, it is not likely that he would decline to defend a presidential decision for policy reasons.

The SG on rare occasions also "confesses error," admitting that a lower court's decision was erroneous, but does so almost exclusively in criminal cases. We generally do not do this, but we (also on rare occasions) may reach the same result by settling cases on appeal.

The SG does not always present every possible argument in support of a particular position. We exercise the same discretion in how to present cases. Contrary to what was apparently the view of several people at the June 1992 meeting, we often do not present all possible justifications for agency decisions and actions, but select arguments for both substantive and tactical reasons.

Very occasionally, the SG will decline to defend the position of a governmental agency, but will allow the agency to defend the position itself. This tactic telegraphs to the Supreme Court that the Justice Department does not support the agency's position, and significantly detracts from the power of the government's position. We also sometimes allow (or require) agencies to present their own arguments on appeal, for a variety of reasons. Because there may be many reasons for argument by agency counsel (or a SAAG), such designation does not inform the SJC that the Attorney General disagrees with the agency's position, and therefore does not put the agency at the same tactical disadvantage that federal agencies experience when the SG does not represent them.

In general, any differences between our role and the SG's role are either unimportant or based on our historically different functions. We do exercise judgment in what cases we appeal and how we present those cases. Some advocates would prefer that we exercise our judgment in a manner more skeptical

of certain agency actions and positions. This viewpoint demonstrates a tension between our office and the advocates that is healthy and probably inevitable.

* * *

RESOURCES AVAILABLE FROM THE ATTORNEY GENERAL

Written Materials

Below is a description of some of the written materials that our office makes available to agency counsel, with a note on how to obtain them. Some of the materials are associated with training sessions that have been given in the recent past and that may be available on tape or may be given again if agency counsel are interested; see "Training Sessions," below. All contact persons listed may be reached through our main number, 727-2200.

1. Sexual Harassment: Policy and Training Materials -- The Attorney General has adopted a detailed written policy entitled "Prevention and Elimination of Sexual Harassment in the Workplace." Copies are available for use as a model by those agencies that need to adopt or update their policy in this area. The Attorney General strongly recommends that every agency comply with Executive Order 200 as amended by Executive Order 240 and Administrative Bulletin 89-5 (available from the Executive Office for Administration and Finance). Every agency should have an up-to-date policy on this issue, both in order to promote a positive work environment for all employees and to avoid litigation. We also have available training materials that can be used, in conjunction with a written policy, to sensitize agency personnel to what constitutes sexual harassment and how to deal with it. (Contact: Diane Juliar, Director of Policy and Training)

2. Title II of The Americans with Disabilities Act -- a seven-page memorandum giving an overview of the portion of the ADA (Title II) that applies to public entities. The memo discusses the key phrase "qualified individual with a disability," explains the provisions of Title II in the

areas of employment, program accessibility, communications, training, and agency self-evaluations. The memo was previously circulated to agency counsel, but additional copies are available. (Contact: AAG Stan Eichner, Civil Rights Division)

3. Government Bureau Training -- a bound volume prepared in the summer of 1991 including detailed discussions, backed by extensive citations, of: (a) motions to dismiss, with special emphasis on the Tort Claims Act; (b) summary judgment, with special emphasis on civil rights immunity defenses; (c) expedited trial preparation; (d) substantive civil rights law (needs to be read in light of subsequent caselaw; an update is planned); (e) substantive employment discrimination law (Title VII and G.L. c. 151B); (f) declaratory judgments; (g) the Eleventh Amendment and other state-oriented federal court jurisdictional issues; (h) written advocacy; (i) supplementary points on oral argument; and (j) attorneys fees. (Contact: Sherrie Costa, Administrative Law Division)

4. Chapter 30A/Administrative Law Training -- a bound volume prepared in July of 1992 describing the basic defense of an action in Superior Court under G.L. c. 30A for judicial review of an agency adjudicatory decision or regulation. These materials will be helpful both to counsel handling 30A cases in Superior Court and to anyone, with or without legal training, who must conduct an agency adjudicatory proceeding and/or draft the resulting decision or who must assist in promulgating regulations. A training session based on these materials was given in June of 1992; a videotape is available.

   Areas covered are: (a) procedure in the Superior Court (including time limits, answers, and threshold defenses); (b) defending against claims of agency procedural irregularity (including notice, discovery, evidence, burden of proof, bias/improper influence, quorum, adequacy of findings); and (c) challenges to substantive rulings in adjudications (including evidence and agency expertise on factual questions; the arbitrary-and-capricious test; and penalties) and in rulemaking (including the substance of regs; the authority to adopt them; and emergency regs). (Contact: Sherrie Costa, Administrative Law Division)

5. Brief Bank -- this extensive collection of trial and appellate-level briefs on a wide variety of procedural and substantive issues arising in government law is located in the Administrative Law Division in Room 2019 at One

Ashburton Place. The collection is indexed by subject. You can either call and request a copy of a specific brief by name (including our briefs in many reported decisions of the SJC and Appeals Court in the last few years) or you can come by and look through the index and the bank itself and have a copy made of any relevant brief. (Contact: Sherrie Costa, Administrative Law Division)

6. Government Bureau Form Files -- the Administrative Law Division maintains an up-to-date, indexed, three-looseleaf-volume set of model pleadings, motions, supporting memoranda, and other forms for use in a very wide range of litigation situations. Included are motions to dismiss on a variety of procedural and substantive grounds, discovery motions and objections, summary judgment materials, appellate procedural motions, and attorneys fees motions and agreements. To request a particular item contact Sherrie Costa in the Administrative Law Division, or come to One Ashburton Place, Room 2019, and browse for yourself.

7. State Administrative Decisions: How to Write Them, Challenge Them or Defend Them -- these short materials, distributed at an April 1992 MBA program, offer insight into what makes an administrative adjudicatory decision more or less vulnerable on judicial review and explain some of the defense procedures used by the Attorney General. (Contact: Sherrie Costa, Administrative Law Division)

8. Compendium of Government Law -- This extensive set of case summaries and quotations on a wide variety of areas relevant to government practice is prepared and periodically updated by AAG Bill Pardee. The summaries are indexed by subject and come on three-hole paper; they are a very helpful starting point for briefs and memoranda in agency litigation. The compendium is currently about 1500 pages long; we will loan you a copy for duplication at your agency. (Contact: Sherrie Costa, Administrative Law Division)

9. Protecting Agency Personnel from Depositions -- this collection of motions to quash and supporting memoranda will help you to respond to attempts to depose agency personnel, particularly high level personnel who are sometimes targeted for depositions despite lack of significant personal knowledge of the issues involved in the underlying case. Because an agency official or employee may be subpoenaed for a deposition even in a case to which the agency, official, or employee is not a party,

the Attorney General is not always involved in the case at the time the deposition subpoena is received. These materials can help you respond to the subpoena and sometimes to persuade opposing counsel to withdraw or modify it without a court order and without our involvement; of course, we stand ready to assist if necessary. (Contact: Sherrie Costa, Administrative Law Division)

10. The Massachusetts Tort Claims Act -- a one-volume introduction to G.L. c. 258, updated in June of 1992. Included are articles on coverage, presentment, and forum; the exclusion of discretionary functions and intentional torts and the relationship of the MTCA to other causes of action; housing authority coverage; and civil rights claims and indemnification procedures. (Contact: AAG Tim Mullen, Trial Division, 131 Tremont Street)

11. Discovery Practice and Procedure -- a one-volume manual covering not only discovery issues but also pleading rules and motion practice. (Contact: AAG Tim Mullen, Trial Division, 131 Tremont Street)

12. Government Bureau Report -- this report, prepared for the Attorney General approximately every two months, details the Government Bureau's activities, including significant new court decisions (including some trial court decisions and unreported appellate cases), developments in pending cases, significant new defensive and affirmative cases, and other events of interest. General counsel to agencies should already be receiving a copy on a regular basis; if you are not, or need additional copies, contact Sherrie Costa in the Administrative Law Division.

13. Notes on Relations between the Attorney General and Agencies -- The March, 1992 meeting between the Attorney General and agency counsel featured a panel discussion of issues that may arise during litigation on behalf of agencies. This four-page memorandum summarizes the Attorney General's approach to issues such as disagreements over agency or legislative policy choices; settlement decisions; division of responsibilities in handling litigation; and bearing the costs of litigation. For copies contact Sherrie Costa in the Administrative Law Division.

14. Guidelines for Formal Attorney General Opinions -- this four-page memorandum describes the types of questions that are appropriate for a formal, published opinion, the effect

of such an opinion, and the procedure for obtaining one. Currently, most opinion requests are handled on a less formal basis that is specifically tailored to the needs of the requesting agency and that does not lead to a published opinion. For an agency that wants to follow the more formal route, however, this memorandum is essential reading. Copies were distributed to agency counsel in July of 1991; if you need another copy, contact AAG Peter Sacks.

15. Open Meeting Law Guidelines -- The Attorney General is charged with the enforcement of the state Open Meeting Law, G. L. c. 30A, §§ 11A, 11A 1/2. In general the law requires that meetings of governmental bodies be open to the public, that notice of the meetings be posted and that accurate minutes be kept and made available to the public. Open Meeting Law Guidelines is an introduction to and overview of the law and the important cases interpreting it. (Contact: Elections Division Chief Bill Lee)

16. Soliciting Signatures on Nomination Papers and Initiative Petitions on Public Property -- this 1991 joint memorandum from the Attorney General and the Secretary of State discusses the extent to which members of the public must be permitted to come onto public property to gather voters' signatures on nomination papers and initiative petitions. The memorandum was originally addressed to municipal counsel, but many of the principles will be applicable to state agencies. (Contact: Elections Division Chief Bill Lee)

Note that the State Ethics Commission makes available a very useful and up-to-date written introduction to the laws governing political activity by public employees. Issues addressed include campaign use of public resources; campaigning on the job; solicitation and fundraising; and representing campaigns in dealing with the government. Contact the Commission at One Ashburton Place, Room 619, 727-0060 and request a copy of Commission Advisory No. 4.

Training Sessions and Workshops

1. Title II of The Americans with Disabilities Act -- AAG Stan Eichner of the Civil Rights Division is available to train agency personnel regarding the applicable requirements of the ADA if there is a substantial need for such training at a particular agency or agencies. Written materials are always available; see above.

2. Chapter 30A/Administrative Law Training -- a videotape of the June 1992 training session on chapter 30A cases. For further information see the discussion above under "Written Materials." For a copy of the videotape contact Sherrie Costa in the Administrative Law Division.

3. "How to Define the Public Interest -- the Attorney General's Litigation Choices" -- a videotape of a June 29, 1992 panel discussion program involving representatives of advocacy groups and the Attorney General. The program addressed the ways in which the Attorney General can and should set priorities and exercise discretion in (a) bringing affirmative litigation, and (b) defending agency and legislative policy choices with which advocacy groups (and sometimes the Attorney General himself) may disagree. Alternative approaches to resolving disputes involving the Attorney General, advocates, and agencies were also discussed. Two articles growing out of this program appear elsewhere in this newsletter; the videotape of the program itself is available by contacting Sherrie Costa in the Administrative Law Division.

How Can We Help?

Are there areas not mentioned in our list of resources in which our advice could be helpful? For example, could you or other agency personnel benefit from written materials and/or training sessions concerning difficult employees and employment litigation? Conducting investigations? Evaluating tort claims? Please contact AAG Douglas Wilkins, Chief of Litigation and Training in the Government Bureau, if you would like to discuss your ideas along these lines.

ASSISTANCE AND CONTACTS IN THE OFFICE OF THE ATTORNEY GENERAL

Scott Harshbarger, Attorney General
Thomas H. Green, First Assistant Attorney General

Executive Bureau

Stephen Limon, Legal Counsel
Diane Juliar, Director of Policy and Training
William Lee, Elections/Open Meeting/Public Records Division

Government Bureau

Judith Fabricant, Chief
Douglas Wilkins, Director of Litigation and Training
William Porter, Affirmative Litigation Coordinator

Administrative Law Division

Judith Yogman, Chief
Anthony Penski, Municipal Law Unit
Peter Sacks, Opinions Unit

Trial Division

Stuart Rossman, Chief
William Daggett, Managing Attorney

Public Protection Bureau

Barbara Anthony, Chief

Criminal Bureau

Edward Rapacki, Chief
Patricia Bernstein, Public Integrity Division Chief

Family and Community Crimes Bureau

Jane Tewksbury, Chief

Western Massachusetts Division (Springfield)

Edward Berlin, Chief (413/784-1240)

Task Force and Advisory Group Contacts

School Superintendents: Norah Wylie
Environment: Martin Levin, Ann Berwick
Elders: Jane Tewksbury, Carrie Smotrich
Medicaid Fraud: Michael Kogut
Public Charities: Richard Allen
Public Integrity: Patricia Bernstein
Workers Compensation: Jim Bryant, Carmen Russo
Lead Poisoning: Leslie Greer, Dorothy Anderson

RESPONSE SHEET

(See reverse; use this space if necessary.)

RESPONSE SHEET

We hope that you enjoyed this first issue of Attorney General Scott Harshbarger's Agency Counsel Newsletter. We have sent one copy to each agency on our mailing list. If your agency has more than one lawyer and would like to receive more than one copy of this and future issues, or if your agency does not yet appear on our mailing list, please fill in this form and return it to Erin O'Sullivan, Publications Coordinator, One Ashburton Place, 20th Floor, or telephone us at 727-2200 ext. 2674.

Also, if you have any comments or suggestions for topics to be addressed in future issues, please indicate them below, and attach any items of your own for inclusion in a future issue.

Name of Agency:_____

1. Please send our agency ___ additional copies of this and future issues, at the following address:

2. Also, please send copies to the following address(es):

   Send ___ copies to: Send ___ copies to:

3. Comments and suggestions for topics to be addressed in future issues:

Thank you for your cooperation and your ideas.